Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

CHARLES MEYERS
Petitioner

V.

CITY OF LITTLETON AND THE
PEOPLE OF THE STATE OF COLORADO
AND
THE MUNICIPAL COURT IN AND FOR THE CITY OF LITTLETON
Respondents

On Petition for Writ of Certiorari
To The Supreme Court, State of Colorado

Charles Meyers, *on his own behalf*
C/o 279 W. Jamison Circle, #53
Littleton, CO 80120
720 922 9443

Questions Presented for Review

1. Home Rule and Equal Protection: Can the legislature grant home rule municipalities with independence that exempts them from the Rule of Law? CRS 16-1-102 permits, and the Colorado Supreme Court grants, municipal courts the power to impose penalties in excess of those provided by Colorado statute, and other states, for the same crime.

2. Knowing, intelligent waiver of counsel: Can a generic, spoken video advisement (addressed to a group of about 100 defendants on a 20' TV screen) that includes the warning that the court has the power to impose a jail sentence, substitute for a specific warning that the prosecution is ***definitely seeking*** jail time against a specific Defendant in a specific action?

3. Erroneous Jury Instruction: The municipal court included a jury instruction describing "abandonment," (an element of the state statute for theft CRS 18-4-401), although "abandonment" was not an element of the municipal ordinance, (shoplifting) which ***was*** the crime charged [Littleton Municipal Code 6-4-30(A)]. Was it unconstitutional for the court to provide the jury with instructions to convict using a misapplied element of the state criminal statute, even though the element was not an element of the crime charged?

4. Evidence: Can an accuser (a merchant) be exempt from the Rules of Evidence in an action prosecuted as a crime under the municipal code, because the municipal code violation is not prosecuted by a State actor?

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PETITION FOR CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to the Colorado Supreme Court to address the disparate treatment of citizens allowed under "home rule" authority, and for this Honorable Court to review a decision from a Municipal court, that was affirmed by the Colorado District Court, and for which review was denied by the Colorado Supreme Court.

OPINIONS BELOW

There are 4 court orders reproduced in the Appendix, to wit: ***Appendix 1*** - The Order after conviction, entered by the Municipal Court; ***Appendix 2*** – the Order on Appeal entered by the Colorado State District Court; ***Appendix 3*** – The State District Court Order denying Reconsideration; ***Appendix 4*** – The Order denying a Writ of Certiorari, entered by the Colorado Supreme Court.

JURISDICTION

The Colorado Supreme Court denied certiorari on **August 14, 2006**. This action is brought within 90 days of such date. This court has jurisdiction pursuant to **28 USC 1257**. Defendant asserts that the protections afforded by the United States Constitution, promulgated through the 14th Amendment, must apply to home rule municipalities. For purposes of Supreme Court Rule 10, Petitioner asserts that the municipal court has proceeded in a way repugnant to the Constitution. In their decisions to date, the Colorado courts have exempted home rule jurisdictions from the Rule of Law established by the U.S. Constitution and from U.S. Supreme Court law. **28 USC §2403(b)** may apply in that Petitioner is challenging the constitutionality of Colorado Revised Statutes 16-5-501 and 16-1-102.

ORDINANCE INVOLVED

LITTLETON MUNICIPAL CODE 6-4-30(A), Shoplifting.

Shoplifting Prohibited: It shall be unlawful for any person to commit shoplifting. A person commits shoplifting if he or she knowingly or intentionally conceals or carries away, with the intent to permanently deprive the owner of its use or benefit, any item or items of merchandise offered for sale or display within a retail store where the aggregate retail value of the item or items is less than five hundred dollars ($500.00).

STATUTORY PROVISIONS INVOLVED

COLORADO REVISED STATUTES 16-5-501: (Incarceration)

"Except as otherwise provided, in any criminal prosecution for class 2 and class 3 misdemeanors, petty offenses, class 1 and class 2 misdemeanor traffic offenses, or **municipal or county ordinance violations**, the prosecuting attorney **may**, at any time during the prosecution, state in writing whether or not he or she will seek incarceration as part of the penalty upon conviction of an offense for which the defendant has been charged. If the prosecuting attorney does not seek incarceration as part of such penalty, legal representation and supporting services need not thereafter be provided for the defendant at state expense, and no such defendant shall be incarcerated if found guilty of the charges against him or her, but the defendant shall be subject to all alternatives available to the court under section 18-1.3-702, C.R.S. and to alternatives available to each municipality under its municipal ordinances for failure to pay fines and costs." [Emphasis added.]

COLORADO REVISED STATUTES 16-1-102: (Application of Criminal Procedure).

> "The provisions of this code are intended to create, define, and **protect rights**, duties, and obligations as distinguished from matters wholly procedural. Except as specifically set forth in this code, the provisions of this code are **not applicable** to proceedings under the "Colorado Children's Code" or **to violations** of municipal charters or **municipal ordinances**." [Emphasis added.]

COLORADO REVISED STATUTES 18-4-401: (Colorado's theft statute, the state's counterpart for the municipal ordinance involved).

> "A person commits theft when he knowingly obtains or exercises control over anything of value of another without authorization, or by threat or deception, and:
>
> (a) Intends to deprive the other person permanently of the use or benefit of the thing of value; or
>
> (b) Knowingly uses, conceals, **or abandons** the thing of value in such manner as to deprive the other person permanently of its use or benefit; or
> (c) Uses, conceals, or abandons, the thing of value intending that such use, concealment, or abandonment will deprive the other person permanently of its use and benefit; or
>
> (d) Demands any consideration to which he is not legally entitled as a condition of restoring the thing of value to the other person" [Emphasis added.]

CONSTITUTIONAL PROVISIONS INVOLVED

5TH AMENDMENT: "No Person shall be ... deprived of ..liberty .. without due process of law; ..."

14TH AMENDMENT: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

U.S. SUPREME COURT DECISION INVOLVED

Argersinger v. Hamlin, 407 U.S. 25, which holds in relative part:

> "We hold, therefore, that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial...This holding is applicable to all criminal prosecutions, including prosecutions for violations of municipal ordinance." Page 37. And, " . . . no imprisonment may be imposed, even though local law permits it, unless the accused is represented by counsel." Page 40.

COLORADO SUPREME COURT DECISION INVOLVED

*People v. Wade,*757 P. 2d 1074; which holds in relevant part:

> " ... it is also clear from the reasoning of both cases that a city's choice of a sentencing scheme different from the state's is well within the city's constitutional power as a home rule city."

INTRODUCTION

To supplement his research into international and municipal law, Petitioner/Defendant committed an act of Civil Disobedience to expose and challenge the unconstitutional procedures practiced in municipal courts. The Colorado legislature has delegated its municipal courts omnipotent control to conduct prosecutions and impose penalties without consistency with state statute or rules, C.R.S. 16-1-102 [quoted on page 3, *supra*]. This practice has been upheld as constitutional by the Colorado Supreme Court, *People v. Wade*, 757 P 2d. 1074; 87 SC 168, [quoted on page 4, *supra*] resulting in municipal courts abusing the rights of Colorado citizens.

Defendant was charged under a municipal ordinance with shoplifting $20.00 worth of vitamins. The record shows that Defendant was denied the benefits of Criminal Rule 16 (pertaining to disclosure and discovery), convicted with altered evidence, and convicted with a jury instruction entered by the municipal court judge describing an element that was not an element of the crime charged. Then, the Defendant was sentenced to jail without forewarning that jail time was being sought as required by the U.S. Supreme Court holding in *Argersinger v. Hamlin* [quoted on page 4, *supra*]. Defendant raised issues of constitutionally protected rights with his first pleading, with the full intention of preparing this case for review by this Honorable Court.

FACTUAL BACKGROUND

On **November 21, 2004**, the security guard of a grocery store, "King Soopers" stated that he had videotaped Meyers for over 50 minutes and had footage of Meyers shoplifting. He called the Littleton Police, who prepared a summons charging Meyers with violation of the Littleton Municipal Code against

shoplifting. Meyers was not arrested. The Littleton Police did not take into the custody the 3 bottles of allegedly pilfered vitamins nor the videotape that was made of the incident. On **December 15, 2004,** Meyers, appeared *pro se* for arraignment. On that day, all defendants appearing were advised of the maximum penalties that might be imposed by the municipal court for any and all crimes charged. All defendants were handed a "Court Directive" explaining "*Jury Trial Policy and Mandatory Pre-Trial Conference*" explaining court procedures - not specific penalties. [This is Document N of the Court Record]. Meyers pleaded not guilty and trial was set for **March 11, 2005**. On **January 10, 2005**, Meyers filed a "Demand" for production of evidence because the disclosures provided to him by the prosecutor had no videotape. [Document S1 of the Record]. Such subpoena was denied and on **January 13, 2005** Meyer's filed a second request. [Document V1 of the Record]. To justify denial of court issued subpoenas, the court stated, "Review of D's request for subpoena lists witnesses who [sic] names are not contained in police reports. By appearance of motion D must show need for these witnesses." [Document Record A2]. On **February 14, 2005**, Meyers filed a *Motion to Dismiss for Unconstitutional Process*, objecting to the disparity between the penalty available to the municipal court in contrast to the penalty available to the state court for the same crime[1].

Shortly before trial, due his own investigative efforts Meyers was able to acquire the videotape of the incident[2]. Meyers discovered it had been severely edited from 50 minutes to less than 10, and deleted exculpatory evidence. Even though the prosecutor had not disclosed that he intended to use any videotape, on **March 7, 2005**, (4 days before trial) Meyers filed a *Second Motion to Dismiss*, [Appendix E, herein] and a

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[1] State court penalty is limited to $750 and/or 6 months in jail.

[2] The prosecutor refused to acquire the videotape for Meyers, document x of the record.

Motion to Suppress, objecting to the potential use of the edited videotape. One day later, the court denied Meyers' objection. On the morning of trial, **March 11, 2005,** a copy of the edited videotape *was* produced by the prosecutor (in violation of disclosure timeframe of Criminal Rule 16). Trial proceeded after Meyers' objection to the videotape [Transcript page 7 line 23][3] was denied.

At trial, the store security guard confirmed through testimony that he deleted portions of the tape [transcript, pages 34 and 41]. Meyers asserted the deleted videotape contained exculpatory evidence critical to his defense because it would have shown Meyers returning the store's merchandize to shelves about the store.

On the day of trial, the court examined Meyers' one witness and determined that her testimony regarding Meyers' research into the municipal justice system [*mens rea*] would not be allowed. (Transcript March 11, 2005, Page 5, line 22). Meyers objected asserting that there is no law that limits a Defendants' right to witnesses in his defense.

Meyers' jury instruction as to his theory of defense (explaining his research project into municipal procedure) was denied. [Document MM, Court Record]. Instead, the court created a jury instruction on abandonment to address Meyers' testimony that he returned merchandize to the store shelves. Meyers objected to allowing the jury to find him guilty of abandonment since that element was not part of the shoplifting crime charged [quoted on page 2, *supra*] and was being misapplied to the circumstances – because "abandonment" as intended by the statute refers to abandoning a stolen car – not moving store merchandize from

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[3] The court orders state that Meyers conceded to the use of the edited videotape but this is an incorrect finding contrary to the evidence.

one shelf to another (indeed, as all shoppers do on occasion when changing their mind about the purchase).

The jury found Meyers guilty. The court imposed a 10 day jail sentence and a $142.30 fine. Meyers timely appealed to the State District Court, who affirmed the decision [Appendix B]. Meyers motioned for reconsideration and the District Court ordered a response from the City of Littleton[4]. The State District denied the reconsideration. [Appendix C.] Meyers then timely appealed to the State Supreme Court, who denied review. [Appendix D]. This appeal followed.

CITATIONS FROM LOWER COURT DECISIONS

ISSUE 1:
Home Rule & Equal Protection

Exemption from state and federal constitutional law: To reject Defendant's arguments that the criminal prosecutorial procedure in the municipal court is unconstitutional, the lower courts adopted the City of Littleton's logic, e.g., *"In order for there to be a constitutional issue . . . there must be a state action. Here there is none."* This logic was rep ·ed by the appellate court, on page 2, November 16, 2005, "*Clearly, that is lacking in this case, as there is no state action.*" Appendix B4; and Appendix C5. The lower courts ignored the fact that the charges were brought by serving a summons from "THE PEOPLE OF THE STATE OF COLORADO" and held that municipal court prosecutions are not subject to the same due process procedures that control evidence because they are not "state actors". This logic caused Meyers to be denied exculpatory evidence because the merchant controlled the evidence, with no obligation to

[4] The City of Littleton motioned the appellate court to order Meyers to pay for the preparation of their court-ordered response to Meyers' Motion to Reconsider, as though it was a civil proceeding. That motion was denied.

preserve its integrity. The merchant was able to destroy evidence with complete impunity.

ISSUE 2:
Advisement of Potential Jail Time

Knowing; waiver of counsel: Defendant appealed the imposition of jail time by relying on the Supreme Court decision, *Argersinger v. Hamlin*, 407 U.S. 25, which precludes a sentence of jail time if the defendant was unrepresented at trial. [See quotation on page 4, *supra*].

The municipal court judge rejected Defendant's reliance on *Argersinger* because "*Defendant has represented himself to the Court as a person with special knowledge*" [of law and procedure] and "*The record does not support the Defendant's claims that he is unable to articulate his legal arguments in a public setting, nor to present his case before the jury.*" [Appendix A4]. Defendant argues that he did not write his pleadings, so an assumption of his ability to conduct a trial was misconstrued. Defendant would not have proceeded *pro se* to trial if he had known he was risking a jail sentence for his research. A reasonable person would not presume a jail sentence is likely when, as here, (a) it was a first time offense, (b) there was no violence involved; and (c) the amount of merchandise involved was minimal. Additionally, every judge knows that conducting a trial requires *special training* and cannot hold a *pro se* litigant as qualified. While Colorado has enacted a statute purporting to require warning a defendant of definite jail time, [CRS 16-5-501, quoted on page 2, *supra*], that statute is rendered vague and meaningless by the use of the word "may" pertaining to such disclosure.

In addressing the Defendant's reliance on *Argersinger* the municipal court held, "*He does not assert a failure to advise him of the allowable punishment should conviction enter.*"

[April 1, 2005, Appendix A4, 5]. The fact that the ordinance "allows" jail time (in addition to a fine) does not meet the requirement of *Argersinger*, that requires the defendant to be ***informed*** that jail time ***was being sought***. (*Argersinger* at page 34, quoted on page 4, *supra*).

On Appeal, the District Court upheld the imposition of jail, in spite of the *Argersinger* holding, because "*Appellant conceded that the Municipal Court advises and warns a defendant that the possible penalty includes an imposition of jail sentence.*" (Reconsideration Order dated May 12, 2006, Appendix C3.) Again, Defendant argues that the "possibility" of a jail sentence is not a disclosure that it is definitely being sought. Without such information it is impossible to make an "intelligent, knowing waiver of counsel."

FACTS PERTAINING TO ISSUE 3:
Jury Instruction

Supplementing the municipal crime with elements that are not charged: The elements of the ordinance for shoplifting, Municipal Code 6-4-30(A), does not include the element of "abandonment" [quoted on page 2, *supra*] as does the state counterpart, CRS 18-4-401 [misdemeanor theft, quoted on page 3 *supra*]. The lower courts allowed the jury to convict the defendant of "abandonment" holding "*The jury instructions laying out the elements of CRS 18-4-401 for proof beyond a reasonable doubt were adequate. The formulation and use of the jury questions were not an abuse of discretion.*" Appellate order Nov 16, 2005, Appendix B5. **The defendant was not charged with CRS 18-4-401** and jury instructions pertaining to that crime should not have been used against him.

If the two crimes *are* deemed identical -- regardless of the difference between their elements -- (permitting the use of the renegade jury instruction) then the municipal ordinance must be

void for violation of the Equal Protection clause and the 6th Amendment because there are two different penalties for the same crime, to wit: Violation of the municipal ordinance [indeed, any and all ordinances] is punishable by $1000 and/or a year in jail. Punishment under the state statute is $750 and/or 6 months in jail. See 18-4-401, 18-4-401(a), 18-1.3-501, C.R.S. Additionally, the same crime in other jurisdictions carries yet other penalties. For instance, in the State of Washington, the maximum penalty is 90 days jail and $1,000.00. In Massachusetts, the maximum penalty for shoplifting is $250.00 and no jail time.

FACTS PERTAINING TO ISSUE 4:
Evidence

Denied Exculpatory Evidence: The defendant repeatedly objected to the fact that the surveillance videotape used to convict him was edited by the merchant. A motion to suppress was denied. [Document FF1 of the Record]. The court's order of May 12, 2006, [Appendix C5] acknowledged the fact that evidence was destroyed, to wit: "*The evidence was destroyed prior to a subpoena for trial.*" In upholding the municipal court's decision to allow the incomplete and edited evidence, the District Court held that only the state (not a merchant) is required to properly preserve evidence, "*In order to establish that the prosecution has destroyed exculpatory evidence, there must have been an act on the part of the prosecution to do so . . . Clearly that is lacking in this case, as there is no state action.*" November 16, 2005 order, Appendix B4. After reconsideration, the District Court added, "*Here however, the evidence was not under control of the state as it was under the control of King Sooper's. . . Accordingly, the Court cannot impute any state action in the present case, and the finding by the Court is affirmed that Appellant was not denied exculpatory evidence.*" See May 12, 2006 Order, Appendix C5. Exempting a merchant from the principles of the rules of evidence – and

allowing them to destroy evidence -- is a denial of due process. The defendant had no chance for a meaningful defense, since the merchant was allowed to destroy evidence.

To further emphasize the inconsistent identification of the nature of the action (e.g. civil or criminal), it must be noted that the citation served upon the defendant identifies the "People of the State of Colorado" as the Plaintiff, yet for the purposes of applying due process, the Plaintiff becomes a store merchant and exempt from the Criminal Rules of Evidence. At other times during the prosecution, the Plaintiff was identified variously as "The City of Littleton and the People of the State of Colorado" and as "City of Littleton and the Municipal Court, in and for the City of Littleton."

TIME AT WHICH CONSTITUTIONAL ARGUMENTS RAISED

Equal Protection – 14th Amendment: Defendant relies on the 5th and 14th Amendments to assert his claims for due process and Equal Protection. His claims were first raised in a pretrial motion [February 14, 2005] asserting that the *potential* penalty permitted under the ordinance was disparate with that allowed under the state statute **[C.R.S. 18-1-401]** for the same crime (and disparate with other state penalties for the same crime), and therefore void. He raised issues of due process in his Motions to Dismiss prior to trial.

After being sentenced to 10 days in jail, Meyers raised a constitutional argument against the penalty as being in violation of the Supreme Court decision in ***Argersinger v. Hamlin***, 407 U.S. 25, that holds that jail time cannot be imposed against a defendant who was unrepresented by counsel at trial.

COMPELLING REASONS TO GRANT REVIEW

1. **Disparate Treatment of citizens within the State of Colorado and in contrast to citizens in the State of Washington and Massachusetts:** Colorado courts have held that municipal and/or home rule jurisdictions are not obligated to provide equal treatment to defendants. ***People v. Wade, 757 P. 2d 1074, 1076 (Colo. 1988)*** holds, "...[a] city's choice of a sentencing scheme different from the state's is well within the city's constitutional power as a home rule city." And, a home rule city has the ". . . right to impose its own systems of punishments for violations of its ordinances."

The Colorado Legislature has also specifically exempted home rule jurisdictions from protecting the rights of citizens. Colorado's Code of Criminal Procedure states in CRS 16-1-102, ". . . the provisions of this code are ***not applicable*** to proceedings under the "Colorado Children's Code" or ***to violations of*** municipal charters or ***municipal ordinances.***"

The Colorado Supreme Court has held that municipal courts may punish defendants with complete discretion. In this case, the ordinance at issue provides for disparate treatment because it allows a penalty (up to 1 year in jail and $1000.00 fine) which is in excess of that allowed at the state level for the same crime (6 months in jail and $750.00 fine). Additionally, the same crime (shoplifting) in the State of Washington imposes a limit of a 90 day in jail sentence – and in the State of Massachusetts a first time shoplifter is subject to merely a $250.00 maximum find and no jail time. This socially conscious *pro se* litigant proceeded to trial without counsel because he was not warned that the municipal court would impose jail for the most minor infraction with its "one size fits all" penalty powers. An announcement that jail time is being sought should be required before a defendant is allowed to proceed to trial *pro se*.

2. **NEED FOR SUPREME COURT SUPERVISION**. The local "home rule" courts have been allowed to operate with tyrannical powers, whether in New York or Colorado. The citizens prosecuted in these courts are typically without funds to hire counsel and it is rare that such a case is exposed to review by this honorable Court. In Colorado, municipal court judges are not under the supervision of the Supreme Court disciplinary procedures, but answer only to a City Council of local lay people who have no legal skills or training with which to question these judges.

The municipal courts have been conducting their prosecutions without compliance with Rules of Criminal Procedure, which has resulted in violations of due process. In this case, a merchant (on whose behalf a shoplifting violation is brought) was not subjected to the rules of evidence because the merchant was not a "state actor". The rules of criminal procedure (including those pertaining to chain of evidence) should be required for due process whether or not the state is the prosecutor, or the city, the county or a store merchant.

The Colorado high courts have extended to the municipal courts the unlimited "discretion" to mix, match, and customize criminal charges to fit the facts and circumstances as necessary to get a conviction. In this case, the courts treated the shoplifting ordinance as identical to the state's misdemeanor theft statute for the purpose of applying a jury instruction that pertains only to the element of "abandonment" within the statutory crime of "theft." This was necessary because the defendant provided testimony that he returned merchandize to the wrong shelves around the store (yet this is not a violation under the ordinance charged). In order to assure a conviction, the jury instruction on "abandonment" was inserted by the judge to allow the jury to find the defendant guilty of at least abandoning merchandize

– a crime for which he had not been charged and for which he had not prepared a defense. Clearly, to date, the municipal court judges are free and unhindered by the constitution to assist in prosecuting from the bench in violation of due process.

For the foregoing reasons, Petitioner respectfully requests that this Court grant review.

Respectfully submitted:

s/ *Charles Meyers*

APPENDIX

(ALL ORDERS WERE REPRODUCED EXACTLY, WITH TYPING ERRORS AS IN THE ORIGINAL)

Findings & Order addressing Defendant's
Motion for Post Trial Relief, April 1, 2005.....Appx. A

Appellate Court's Order, affirming the
Municipal Court Order, Nov 16, 2005.....Appx. B

Appellate Order Denying reconsideration
May 12, 2006 .....Appx. C

Colorado Supreme Court Order denying
Certiorari, August 14, 2006..... Appx. D

Defendant's Second Motion to Dismiss
March 7, 2005..... Appx. E

ARAPAHOE , DOULGAS, [*sic*]
AND JEFFERSON COUNTIES
STATE OF COLORADO

Court Address: City of
Littleton Municipal Court
2069 West Littleton Boulevard
Littleton, Colorado 80120

RECEIVED
APR 1, 2005
LITTLETON
MUNICIPAL COURT

CITY OF LITTLETON and THE PEOPLE OF THE STATE OF COLORADO,
Plaintiff

Vs.

CHARLES MEYERS
360 W. 4th STREET
COLBY, KANSAS 67701

Case No. M345248

Attorney for Defendant: PRO SE
Name:
Address:
Phone
FAX

σ COURT USE ONLY σ

Case Number:

Div: ___ Ctrm:

FINDING AND ORDER

This matter comes before the Court on "Defendant's Motion For Correction Or Vacation Of Sentence", the Prosecutor's "Reply To Motion For Correction Or

Vacation Of Sentence", and "Defendants Waiver Of Oral Argument". The Court's sentence was entered on March 11, 2005, subsequent to a jury verdict of guilty on a shoplifting charge.

The Defendant's written motion, incorporating a supporting brief, was filed on March 15th. The Court instructed the Clerk to set the matter for hearing. The Prosecutor's written reply was filed on March 16th, and the Defendant's written waiver on March 17th.

Numbered Section 4 of Defendant's motion attributes to the Court a finding "...that the defendant 'wasted' everyone's time by pleading not guilty and filing pleadings prior to trial which revealed a political opinion not shared by the court." The record does not support this claim. After the conviction the Defendant was advised that the Court found aggravated circumstances regarding the offense. In part that finding was due to the Defendant's claim of a "staged shoplifting". Accepting that claim arguendo, the Court noted that the defendant had wasted the time and resources of the merchant, the witnesses, and members of the jury panel, and was responsible for a frivolous matter being brought to trial. Alternatively, if the claim of "staged shoplifting" was a perjury, then aggravation lay in the perjurious nature of the defense itself, and in Defendant's statement to the security officer that due to the merchant's high prices they owed the vitamins to the Defendant. On either theory the Court found an aggravated basis for penalty to be imposed on the conviction.

Numbered Section 3 of Defendant's motion claims the ten day jail sentence violated the right of equal protection under the law. It relies upon an unsupported claim that those punished for identical conduct have not been incarcerated. Additionally, the Defendant alludes to "...a first time

accused shoplifter...", but ignores the aggravated factors found by the court to exist in this case.

The last paragraph of numbered Section 2 of Defendant's motion argues that "Defendant proceeded pro se with the understanding that, even if his defense failed, he would not be subject to a jail sentence because (a) he is a first time offender, (b) the amount in question ($21.07) was not excessive and (c) there was no violence or threat of violence involved." There is not the slightest hint that the defendant sought or desired the assistance of counsel. There is nothing to suggest that he was not advised of his right to counsel, and that counsel would be appointed if he asked and was found eligible. There is no claim that his advisement failed to include the potential penalty of a one thousand dollar fine, or one year in jail, or both on conviction. The Defendant's personal opinions regarding first time offenders, what is or is not an "excessive amount", and what may be precluded in the absence of violence or the threat of violence are just that – his personal opinions – and do not determine the sentence of the court.

This leaves the balance of the Defendant's motion to argue the real issue presented to the Court; that is, can the Defendant avoid the imposition of a jail sentence upon conviction by then asserting that he was not represented by council at trial. Defendant's brief relies primarily upon Argersinger, a U.S. Supreme Court case, and the adoption of that case in People v. Arguello, 772 P.2d, 87, a 1989 Colorado Case.

Arguello makes it clear that when a Defendant asserts the waiver of a fundamental constitutional right is invalid, the prosecution must establish a prima facie case that the waiver was effective. Beyond that, Arguello has little in common with the case before this Court. Arguello maintained

throughout his appearance before the Court that he was incompetent to represent himself, and actively sought assistance of counsel. His refusal to accept the representation offered was a major issue in the case, and has no bearing here.

Here, the Defendant has represented himself to the Court as a person with special knowledge. As a part of Defendant's theory of the case, he asserted an extensive study and knowledge of courts and court proceedings. In fact, that theory of the case alleged a staged shoplifting had been generated specifically to monitor how the case would proceed in the municipal court setting. [*Emphasis added*].

Motions were filed prior to trial that demonstrated special knowledge, and have been speedily filed subsequent to trial which continue to demonstrate special knowledge. **The record does not support the Defendant's claim that he is unable to articulate his legal arguments in a public setting, nor to present his case before the jury.** [*Emphasis added*].

The Prosecutor's reply sets forth that Defendant was properly advised. No additional evidence is offered to dispute the adequacy of that advisement. The issue is limited to whether representation was waived. A waiver is "an intentional relinquishment or abandonment of a known right or privilege." Arguello at page 93, setting forth antecedents. Whether a waiver is effective in a given case depends on the totality of the circumstances. Unlike Arguello, the Defendant has asserted his desire to proceed pro se, and never indicated any desire to be represented by counsel, appointed or otherwise. He has continually demonstrated a knowledge of the law and of procedure, and even now continues pro se, despite his request for relief from the sentence. Defendant seeks only to avoid the jail

sentence. He does not assert that he failed to apprehend the nature of the charge, or an understanding of the ordinance section under which he was charged. He does not assert a failure to advise him of the allowable punishment should conviction enter. He does not assert any failure to comprehend the facts essential to an understanding of the entire matter. He does not claim a lack of knowledge regarding defenses to the charge, but vigorously sets forth the defense of a "staged shoplifting", which he argues negates the commission of a crime. On conviction, he sets forth the same theory in mitigation. On the totality of the record, the Court finds no basis to grant the relief requested. Defendant's motion is denied.

Filing of this motion places the entire matter back before the Municipal Court. The Defendant has thirty days from the Court's ruling on the motion to appeal. The order previously set forth by this Court to stay payment of any fine and costs, and to surrender the person of the Defendant to begin serving the jail sentence ordered by the Court are rendered moot. There is a requirement to appear on the post conviction bond, and the Defendant must make that appearance before this Court on or before April 15, 2005, to have the bond continued. On that appearance, and with the consent of the surety, the stay shall be continued to a date and time certain that is at least thirty days after the date on which this order has been signed by the Court.

Dated this 1st day of April 2005.

By the court:

s/ Jerald G. Kriss
Jerald G. Kriss, Judge

CERTIFICATE OF MAILING

I hereby certify that a copy of the MOTION ASSIGNMENT ORDER was mailed by me this 4th day of April 2005 to:

Charles Meyers
360 W 4th Street
Colby, Kansas 67701

By *s/Patricia A Spindler*
Patricia A. Spindler
Court Administrator

CERTIFICATE OF HAND DELIVERY

I hereby certify that a copy of the MOTION ASSIGNMENT ORDER was hand delivered by me this 4th day of April 2005 to:

Alan Katz
Assistant City Attorney
City of Littleton
2069 West Littleton Boulevard
Littleton, Colorado 80120

By *s/Patricia A. Spindler*
Patricia A. Spindler
Court Administrator

DISTRICT COURT, ARAPAHOE COUNTY, COLORADO 7325 South Potomac Street Centennial, Colorado 80112 **Appellee:** THE PEOPLE OF THE CITY OF LITTLETON, BY AND ON BEHALF OF THE STATE OF COLORADO, Plaintiff v. **Appellant:** CHARLES MEYERS	σ COURT USE ONLY σ Case Number: 05CV2003 Div: 407

ORDER

THIS IS an appeal from a decision of the Littleton Municipal Court. The Honorable Jerald G. Kriss, Judge of the Littleton Municipal Court, presided on March 11, 2004.

The Appellant-Defendant (hereinafter referred to as the Defendant) appeared pro se. The Appellee-People (hereinafter referred to as the People) were represented by Alan Katz, Littleton City Attorney. The court found the Defendant guilty of shoplifting. The Defendant appeals the decision. For reasons set forth below, the decision of the county court is AFFIRMED.

FACTUAL AND PROCEDURAL BACKGROUND

The Defendant was stopped by a King Soopers employee upon suspicion of shoplifting. The Defendant was issued a complaint and summons by an officer based on the observations of the King Soopers employee. A security camera recorded the entire incident, approximately 50 minutes in all. The defendant pled not guilty. The court found the Defendant guilty and the Defendant now appeals the decision.

ISSUES

The Defendant presents several issues for review:

1. Whether the ordinance is void pursuant to the Equal Protection Clause of the 14th Amendment of the U.S. Constitution as applied to the states?

2. Whether the Defendant was denied the opportunity by the court to present witnesses?

3. Whether the Defendant was denied exculpatory evidence?

4. Whether the Defendant was subjected to custodial interrogation without first being advised of his rights pursuant to *Miranda*?

5. Whether the jury instructions on the elements of the offense were sufficient?

6. Whether the sentence imposed was "cruel and unusual punishment" pursuant to the 8th Amendment of the U.S. Constitution?

STANDARD OF REVIEW

A District Court, in reviewing a decision by the County Court, sits as any appellate court. See Colo. Rule County Court Proc. 411, Colo. Rev. Stat. §13-6-410 (West 1999). *People v. Anderson*, 492 P.2d 844 (Colo. 1972).

It is the function of an appellate court to review for error the trial court's ruling on issues of law and/or fact. See *Mowry v. Jackson*, 343 P.2d 833 (Colo. 1959). Where a question is solely one of law, the appellate court is not bound by the trial court's conclusions and is just as capable of determining the question as was the trial court. See *Radke v. Union Pac. Railroad Co.*, 334 P. 1077 (Colo. 1959). An appellate court will not disturb the trial court's findings of fact so long as they are supported by substantial evidence. See *Mowry*, 343 P.2d 833, *Am. Nat'l Bank of Denver v. Christensen*, 476 P.2d 281 (Colo. App. 1970).

DISCUSSION

1. Whether the ordinance is void pursuant to the Equal Protection Clause of the 14th Amendment of the U.S. Constitution as applied to the states?

There is no evidence in the record, nor does the Defendant claim, that the Defendant was subjected to different treatment as a result of membership in a legally cognizable class. The shoplifting statute, C.R.S. 18-4-01, sets up a sentencing range which is applicable to all convicted of violating the statute, and the sentence imposed in this matter falls within the potential penalty under law. The Defendant's Equal Protection claim is wholly without merit.

2. Whether the Defendant was denied the opportunity by the court to present witnesses?

The record indicates that the Defendant was given the opportunity to present witnesses, but had to show the threshold need for the witnesses in this case before the proposed witnesses would be subpoenaed. Defendant was denied subpoenas for witnesses who would describe his "affirmative defense" of testing the municipal legal system. This "affirmative defense" is illusory, as it does nothing to relieve culpability for the offense charged.

Since the Defendant's theory and his proposed witness to subpoena was not material to the central issue of the trial, namely, whether C.R.S. 18-4-401 was violated that day or not. It was not an abuse of discretion to deny the subpoena for the Defendant's proposed witness.

3. Whether the Defendant was denied exculpatory evidence?

With regard to the video, it was edited by the King Soopers employee who had witnessed it while being recorded. The edit condensed the incident to eight minutes on the tape, in order to capture the salient moments of the theft. (Transcript at p. 34) **In order to establish that the prosecution has destroyed exculpatory evidence, there must have been an act on the part of the prosecution to do so.** *People v. Simpson*, 93 P.3d 551 (Colo. App. 2003). **Clearly this is lacking in this case, as there is no state action.** With regard to the pill bottles, there was ample testimony that there was no signifying marks that would have given it evidentiary value greater than a photograph. The Defendant was not denied exculpatory evidence. *[Emphasis added.]*

4. Whether the Defendant was subjected to custodial interrogation without first being advised of his rights pursuant to *Miranda*?

There was no custodial interrogation pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966). The Defendant's statements were not the product of police interrogation and he was not in the "custody" of the police at the time he gave them.

5. Whether the jury instructions on the elements of the offense were sufficient?

The Defendant's theory of the case was presented to the jury on the Defendant's own direct examination of himself, or his narrative of the events of the date in question. The Defendant's proffered "affirmative defense" did not relieve him of culpability even if true. **The jury instructions laying out the elements of C.R.S. 18-4-401 for proof beyond a reasonable doubt were adequate.** The formulation and use of the jury questions were not an abuse of discretion. [Emphasis added.]

6. Whether the sentence imposed was "cruel and unusual punishment" pursuant to the 8th Amendment of the U.S. Constitution?

The sentence was within the statutory range for such an offense, at the low end of available sentencing and well within the trial court's discretion. It was not an abuse of discretion to sentence the Defendant to 10 days in jail and $142.30 in costs and fees. Further, the record indicates that the Defendant was advised pursuant to *People v. Arguello*, 772 P.2d 87 (Colo. 1989) during the preliminary hearings. The trial court cited the Defendant's desire to proceed *pro se* in this matter and lack of desire to be represented by counsel at any stage in the proceedings in finding a knowing waiver of counsel, or "an intentional relinquishment or

abandonment of a known right or privilege." *Id.* at 93. This finding was not an abuse of discretion.

The court would further note that due process entitles a defendant to a fair trial but not a perfect trial. *People v. Dunaway*, 88 P.3d 619, 631 (Colo. 2004); *People v. Roy*, 723 P.2d 1345, 1349 (Colo. 1986). Every indication from the record is that the Defendant was afforded a fair trial.

Order

The judgment of the trial court is AFFIRMED.

Dated this 16th day of November 2005.

BY THE COURT:

s/ Timothy L. Fasing
Timothy L. Fasing
District Court Judge

The Moving Party is hereby ordered to provide a copy of the Order to all parties of record within five (5) days from receipt of this Order and File a Certificate of Compliance within five (5) days thereafter.

DISTRICT COURT, ARAPAHOE COUNTY, COLORADO Arapahoe County Justice Center 7325 South Potomac Street Centennial, Colorado, 80112	σ COURT USE ONLY σ
Plaintiff(s)/Appellee(s): THE PEOPLE OF THE STATE OF COLORADO v. **Defendant(s)/Appellant(s):** CHARLES MEYERS	Case Number: 05CV2003 Div: 407

ORDER DENYING
DEFENDANT'S MOTION FOR RECONSIDERATION

THIS MATTER comes before this Court on Appellant-Defendant's, Motion for Reconsideration of the Courts Order Affirming the trial court judgment of conviction for shoplifting, pursuant to C.A.R.40, Appellee-People's Response, and Appellant-Defendant's Reply hereto. This Court has fully reviewed the motions and the record.

The Appellant-Defendant (hereinafter referred to as the Defendant) appeared pro se. The Appellee-People (hereinafter referred to as the People) were represented by Alan Katz, Littleton City Attorney. A jury found the Defendant guilty of shoplifting. The Court affirmed that judgment. Defendant now petitions for reconsideration of the

Court's decision. For the reasons set forth below, the Court DENIES Defendant's Motion for Reconsideration and continues to AFFIRM the trial courts judgment.

Issues for Reconsideration

The Defendant presents several issues for the Court to reconsider.

1. Whether the Appellant made a knowing, intelligent waiver of counsel?

2. Whether the Court applied the correct ordinance, Littleton Municipal Code's Shoplifting Statute in determining that the ordinance did not violate the Equal Protection Clause of the United States Constitution as applied to the states?

3. Whether the Court applied People v. Shepard in determining that Appellant was not denied exculpatory evidence?

4. Whether the Court correctly applied the law in determining that the jury instruction for abandonment was correctly given and did not result in an unfair trial?

5. Whether the Court failed to consider the issue that aggravating factors were found to impose jail time for the offense?

Standard of Review

1. Whether the Appellant made a knowing, intelligent waiver of counsel?

The Appellant argues that when he decided to defend himself *pro se* he did not make a knowing, intelligent waiver of counsel because he was unaware that incarceration was a possible penalty to shoplifting. In the Appellant's Opening Brief, Appellant argued that the jail sentence of ten days was cruel and unusual punishment and unconstitutional because he was not represented by counsel. On appeal, the Appellant did not argue that he was not given a proper and constitutional advisement during the arraignment hearings. Furthermore, the record is devoid of the arraignment hearings or of the advisement. However, the Court did find the record to include that Appellant conceded that the Municipal Court advises and warns a defendant that the possible penalty includes an imposition of jail sentence. *See Record at Z-1 thru Z-3.* Therefore, this question was not raised or argued in the appeal record. The rule is inapplicable to a question not raised nor argued. *Model Land & Irrigation Co. v. Baca Irrigating Ditch Co.,* 262 P. 517 (Colo. 1927). Accordingly, the Court may not consider the issue as it is not properly before the Court.

2. Whether the Court applied the correct ordinance, Littleton Municipal Code's Shoplifting Statute, in determining that the ordinance did not violate the Equal Protection Clause of the United States Constitution as applied to the states?

Appellant argues that because the Order from the Court referenced Colorado's Theft Statute 18-4-401 rather than Littleton Municipal Code Ordinance 6-4-30(a), it did not properly consider whether the Littleton Municipal Code violated the Equal Protection Clause of the United States Constitution. Appellant argues that under the Colorado Constitution, equal protection is violated if different statutes

proscribe the same criminal conduct with disparate criminal sanctions. *People v. Sharp,* 104 P.3d 252, 255 (Colo. App. 2004) *citing People v. Marcy,* 628 P.2d 69 (Colo. 1981); *see also People v. Westrum,,(sic)* 624 P.2d 1302, 1303 (Colo. 1981) ("[I]t is only where the same criminal conduct is proscribed in both statutes that equal protection problems arise. If reasonable distinctions can be drawn between the statutes, equal protection is not offended.") The Littleton Municipal Code 6-4-30(a) is limited to theft *with intent to permanently deprive* the owner of its use or benefit *of any item or items of merchandise offered for sale or display within a retail store* whose value is less than $500. (emphasis added)[.] However, Colorado's Theft statute is more general and applies to *theft of any item* with intent to permanently deprive *or knowingly use, conceal, or abandon the thing of value as to deprive the other person permanently, or use, concealment, abandonment of thing of value which deprives other permanently of its use and benefit or demands consideration which one is not legally entitled to as a condition to restore the thing of value.* C.R.S. 18-4-401. (emphasis added)[.] Therefore, the Municipal Ordinance only proscribes conduct of theft from a retail store and allows for only one type of possible mens rea to be considered in the prosecution, whereas, the Colorado statute allows for different levels of mens rea and proscribes conduct of theft from any item regardless of where it was taken from. Accordingly, since there is a reasonable distinction between the two statutes the Court finds that equal protection is not offended.

3. Whether the Court applied People v. Sharp in determining that Appellant was denied exculpatory evidence?

The Appellant argues that the Court applied an incorrect standard in determining if Appellant was denied exculpatory evidence by the admittance of an edited video tape showing the event at the King Sooper's store. **The Court stated that Appellant was not denied exculpatory evidence because there was no state action involved in the editing of the video tape.** The Appellant cites to *People v. Sheppard*, for the proposition that even though a private entity lost the evidence, a due process violation can occur. In Sheppard, the Colorado Supreme Court found that the car involved in a deadly accident was towed under direction of the State Patrol and the autobody shop was to await authorization from the state to release the car. As a result, the court found that the evidence (the car) was under state control, therefore, the destruction of the evidence could be imputed to the state. *People v. Sheppard*, 701 P. 2d 49, 52-53(Colo. 1985). **Here however, the evidence was not under the control of the state as it was under the control of King Sooper's . The evidence was destroyed prior to a subpoena for trial.** Accordingly, the Court can not impute any state action in the present case, and the finding by the Court is affirmed that Appellant was not denied exculpatory evidence. [Emphasis added].

Furthermore, the Appellant argues that the admittance of the video tape as edited did not comply with the Rules of Evidence, and was therefore, improperly admitted. Although Appellant did notify the trial court that the tape was not complete, Appellant failed to raise an objection to it's admittance at trial. An objection not preserved at trial is deemed a waiver of the objection, and can not be raised on appeal. *People v. Watson*, 668 P. 2d 965, 967 (Colo. App. 1983*); see also People v. Taggart*, 621 P. 2d 1375 (Colo. 1981); *Hancock v. State, Dept. of Revenue, Motor Vehicle Div.*, 758 P. 2d 1372, 1376 (Colo. 1988).

Accordingly, the Court properly did not consider this argument on appeal.

4. Whether the Court correctly applied the law in determining that the jury instruction for abandonment was correctly given and did not result in an unfair trial?

The Appellant's proffered jury instruction did not contain any elements of a crime and only provided a recitation of the Appellant's theory of the case. Jury instructions framed in the language of statutes are generally adequate and proper. *People v. Dago*, 179 Colo. 1, 497 P. 2d 1261 (1972); *People v. Hayward*, 55 P. 2d 803 (Colo. App. 2002).

The decision to provide a jury with a supplemental or clarifying instruction that properly states the law is within the trial court's discretion and will not be disturbed absent an abuse of discretion. *People v. Pahlavan*, 83 P. 3d 1138, 1141 (Colo. App. 2003) citing *People v. Bielecki*, 964 P. 2d 598 (Colo. App. 1998).

Here the Appellant's theory of the case was that he did not commit shoplifting because he did not have the culpable mental state, mens rea, for the crime. Additionally, the Appellant argued that he could not be found guilty of shoplifting because he did not take the goods but instead returned them to shelves within the store. Therefore, the instruction for abandonment clarified the Defendant's theory of the case, that he abandoned the thing of value. The jury instruction adequately stated the law for a crime of abandonment.

In determining whether the trial court has adequately informed the jury of the defendant's theory of the defense,

all the instructions given must be considered together, *People v. Tippett*, 733 P. 2d 1183, 1195 (Colo. 1987). The Court finds when considering the jury instructions in their entirety, they clearly stated the elements required to find the Appellant guilty for shoplifting and the Appellant's theory of the case. "[E]rror in denying a defense theory of the case instruction is not prejudicial if, when the instructions are considered in their entirety, the defendant's theory could be argued under the other instructions given by the court." *People v. Trujillo*, 83 P. 3d 642, 645 (Colo. 2004) *citing* Robert Dieter, *Colorado Criminal Practice and Procedure* § 18.119 (1996). No error occurs when the trial court refuses to give a defense theory instruction when the contents of other instructions suffice. *Tippett*, 733 P. 2d at 1195; see also *People v. Trujillo*, 83 P. 3d 642, 645 (Colo. 2004). Accordingly, the Court finds the trial court did not err in not providing the Appellant's proffered jury instruction, and finds the abandonment jury instruction only clarified the Appellant's theory of the case.

5. Whether the Court failed to consider the issue that aggravating factors were found to impose jail time for the offense?

A trial court's sentencing decision will not be reversed absent a clear abuse of discretion. *People v. Vigil*, 718 P. 2d 496, 507 (Colo. 1986). An abuse of discretion occurs only when the decision is manifestly arbitrary, unreasonable, or unfair. *People v. Milton*, 732 P. 2d 1199 (Colo. 1987)[.] The Defendant argues that because he was sentenced to 10 days jail, that the Court must have found aggravating factors, which it did not. Aggravating factors are only required when a court imposes a sentence beyond the presumptive range. C.R.S. 18-1.3-401 (iv)(6)(2006).

Here the sentence imposed was well within the presumptive range for the crime.

The Appellant further argues that the Court should have considered the Appellant's lack of prior criminal record. Mitigating factors such as the defendant's age and prior criminate records are irrelevant in determining whether a sentence is disproportionate in violation of the Eighth Amendment. *People v. Cisneros*, 855 P. 2d 822 (Colo. 1993). Accordingly, the Court finds the trial court did not abuse discretion in sentencing the Appellant to 10 days jail plus a fine.

ACCORDINGLY, Appellant's Motion for Reconsideration is DENIED.

Done this 12th day of May, 2006.

BY THE COURT:

s/ Timothy L. Fasing

Timothy L. Fasing
District Court Judge

SUPREME COURT, STATE OF COLORADO TWO EAST 14TH AVENUE DENVER, COLORADO 80203 CERTIORARI TO THE DISTRICT COURT, ARAPAHO COUNTY, 05CV2003 MUNICIPAL COURT, CITY OF LITTLETON, M34 5248	CASE NO. 06SC365

Petitioner:

CHARLES MEYERS,

v.

Respondents:

CITY OF LITTLETON and THE PEOPLE OF THE STATE OF COLORADO

ORDER OF THE COURT

Upon consideration of the Petition for Writ of Certiorari to the District Court of Arapahoe County, and after review of the record, briefs, and the judgment of said district court, IT IS THIS DAY ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

Seal

BY THE COURT, EN BANC, AUGUST 14, 2006.

Copies mailed via the State's Mail Services Division on 8/14/06. MLK

Charles Meyers
c/o 279 W. Jamison Cir. #53
Littleton CO 80120

Clerk of the District Court
Arapahoe County Justice Ctr.
7325 S. Potomac St.
Centennial, CO 80112

A. Katz
City Attorney
2069 Littleton Blvd.,
Littleton CO 80120

Honorable Jerald Kriss
Littleton Municipal Court
2069 W. Littleton Blvd.
Littleton CO 80120

Clerk of the Court
Littleton Municipal Ct. Cent.
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Littleton Co 80120

Honorable Timothy Fasing
Arapahoe County Justice

7325 S. Potomac St.
Centennial Co 80112

MUNICIPAL COURT, CITY OF LITTLETON, ARAPAHOE COUNTY, STATE OF COLORADO 2069 W. Littleton Blvd. Littleton CO 80120 PEOPLE OF THE STATE OF COLORADO v. CHARLES MEYERS Defendant *Pro Se:* Name: Charles Meyers Address: 360 w. 4TH St. Colby KS 67701 Local Contact: 591 W. Mineral Ave., #916 Littleton CO 80120 PH: 720 922 9443 E-mail: Atty Reg #: n/a	Denied. J. Kriss 3/8/05 σ COURT USE ONLY σ Case Number: M 34 5248

DEFENDANT'S SECOND MOTION TO DISMISS

Comes now the Defendant, to MOTION TO DISMISS and states as follows:

I. FAILURE TO DISCLOSE EXCULPATORY EVIDENCE:

1. Trial is March 11, 2005.

2. The prosecution's disclosure cut off was 10 days before trial pursuant to Rule 16, Colorado Rules Criminal Procedure. Municipal Court rules must follow state rules, pursuant to Rule 60, Rules of Criminal Procedure which states,

"(b) Procedure Not Otherwise Specified. If no procedure is specifically prescribed by rules, the court may proceed in any lawful manner **not inconsistent** with these Rules of Criminal Procedure or with any directive of the Supreme Court regarding the conduct of formal judicial proceedings in the criminal courts, and shall took to the Rules of Civil Procedure and to the applicable law if no Rules of Criminal Procedure exists." [Emphasis added].

3. Rule 16 requires the prosecutor to disclose his prosecution strategy not later than 10 days before trial, pursuant to Part V, C.R.Crim. Proc. Rule 16 which states,

"(a) The furnishing of the items discoverable, referred to in Part I(a)(b) and (c) and Part II(b)(1)(c) and (d) herein, is mandatory and no motions for discovery with respect to such items may be filed.

(b) Time Schedule: (1) . . . **or seven (7) days before trial for a non-felony trial, . . .**" [Emphasis added].

4. At no time has the prosecutor disclosed any video, audio or photographed material regarding the defendant or the alleged crime. All recordings should have been disclosed as part of the prosecutor's mandatory disclosure, Rule 16, Part I (a)(1)(VI). The defendant believes the audio recording has exculpatory evidence.

5. Therefore, without timely disclosing any video, audio tape or photographic material, [the prosecutor even went on record March 28, 2005 *[sic]* saying he had no intent to produce such material] the prosecutor can NOT lawfully introduce any such material at trial, pursuant to rules.

6. Notwithstanding the court *rules* preclude the prosecution from introducing any electronic recordings or photographs at trial, the defendant hereby also relies on primary court decisions from the Colorado Supreme Court, particularly *Garcia v. Dist. Ct.*, 197 Colo. 38, 46; 589 P. 2d 930 (Colo. 1979) to assert that evidence previously undisclosed should be suppressed at trial.

7. Additionally, the material provided to the defendant by the defendant's own investigative endeavors, shows that a surveillance tape was severely edited - destroying the chain of exculpatory evidence. Such material cannot be used by the prosecutor at trial, as it is tampered evidence.

8. Lastly, any statements unaccompanied by the tape recording which was made at the time of the statement, demonstrates that evidence is being suppressed to the detriment to the defendant. This defendant motioned for ALL electronic recordings to be produced in mid January, 2005 in their entirety, unedited and in real time. The City Attorney admitted on the record that he couldn't disclose something that King Soopers had not provided him. [Judge Kriss even entered an order on this matter.] The only recording produced has been a distorted, edited tape, which shows NO SHOPLIFTING acts whatsoever.

9. To produce evidence less than 10 days before trial is prejudicial to the defendant, who does not agree to any continuances.

II. DESTRUCTION OF EVIDENCE:

10. The defendant's right to a lawful, constitutional process in this criminal proceeding has been violated by virtue of the fact that the alleged "stolen merchandise", and audio and video recordings were never taken into custody at the time of the alleged incident. If they had, the defendant would have been able to support his defense based upon the exculpatory evidence that has been conveniently omitted. The prosecution is required to employ regular procedures to preserve the chain of evidence that is material to the charges. *People v. Greathouse*, 742 P. 2d 334, 338 (Colo. 1987); *People v. Humes*, 762 P.2d 665 (Colo. 1988). The U.S. Supreme Court established this requirement in *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194.

WHEREFORE, the defendant motions to dismiss this case, for failure to comply with court rules of discovery and evidence, severely prejudicing the defendant's defense.

Respectfully submitted;

s/ Charles Meyers

Charles Meyers

Certificate Of Service

I certify that a true and correct copy of the foregoing SECOND MOTION TO DISMISS was hand delivered to the following on March 4, 2005:

City Attorney
2069 W. Littleton Blvd.
Littleton, CO 80120

s/ Charles Meyers